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UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA	
JACK FLORA, ERIC MATSON, NATHAN STONER, COURTNEY OWENS, and D.J., A MINOR CHILD, individually and on behalf of similarly situated individuals,	Case No. 3:23-cv-00680-CRB
Plaintiffs,	PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION
v.	COMPLAINT FILED: 2/15/2023
PRISMA LABS, INC.,	Date: July 28, 2023
Defendant.	Time: 10:00 A.M. Dept: Courtroom 6 – 17 th Floor Judge: Hon. Charles R. Breyer

1 SUMMARY OF ARGUMENT

2 This matter is not subject to arbitration because there is no meeting of the minds.
3 Defendant's motion is based entirely on its Terms of Use, an adhesion contract to which
4 Plaintiffs (like all Lensa users) were forced to agree in order to use the Lensa app.
5 Adhesion contracts for arbitration are enforceable under some circumstances, but this
6 is not one of them.

7 Defendant's adhesion contract is internally inconsistent. It mandates arbitration
8 with Judicial Arbitration and Mediation Services (JAMS) pursuant to the JAMS
9 Streamlined Arbitration Rules and Procedures (SARP) but simultaneously requires a
10 number of (anti-consumer) arbitration provisions that violate JAMS rules.

11 In particular, JAMS expressly states in its "Consumer Arbitration Minimum
12 Standards" that it will administer a consumer arbitration "only if the contract arbitration
13 clause and specified applicable rules comply with the ... minimum standard of
14 fairness." Defendant's Terms of Use do not satisfy JAMS "minimum standard of
15 fairness" in multiple ways. First, the JAMS minimum standards provide that "the
16 consumer must have the right to an in-person hearing in his or her hometown area."
17 Defendant's Terms of Use, by contrast, mandate that all disputes are to be resolved by
18 arbitration "held in Santa Clara County, California." In addition to violating the JAMS
19 rules, this provision discourages the users from invoking their rights by making it overly
20 burdensome to do so.

21 Likewise, the JAMS minimum standards for consumers arbitrations state that the
22 only fee a consumer may be required to pay is \$250, "[a]ll other costs must be borne by
23 the company, including any remaining JAMS Case Management Fee **and all**
24 **professional fees for the arbitrator's services.**" Defendant's contract of adhesion,
25 however, specifies that users must submit to the JAMS SARP, which provide that
26 consumer is obligated to pay the arbitrator's fee in addition to bearing the \$250 filing
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1 fee, adding a cost which can easily exceed \$10,000. In other words, if a Lensa user were
2 to invoke arbitration, they would risk subjecting themselves to thousands of dollars in
3 fees and are therefore improperly discouraged from pursuing an action.

4 Accordingly, the arbitration provision Defendant imposed is a legal nullity – it
5 requires users to submit to arbitration in violation the rules of the very arbitral forum
6 Defendant unilaterally selected. An agreement to violate arbitral rules, in particular a
7 contract of adhesion requiring one side to do so, lacks a meeting of the minds and cannot
8 be enforced. In the same vein, Defendant has improperly attempted to discourage users
9 from seeking a remedy by unilaterally imposing requirements that violate the JAMS
10 minimum standards of fairness. Even if there were a meeting of the minds to arbitrate
11 in violation of the rules, which there is not, the contract of adhesion should be
12 unenforceable as a matter of public policy for intimidating users by violating standards
13 of fairness.

14 Defendant's motion also fails because the arbitration provision is
15 unconscionable. Under California law, arbitration provisions included in adhesion
16 contracts are unenforceable where the terms of the arbitration provision significantly
17 tilt the playing field against the consumer. Not surprisingly, the absence of terms
18 mandated by the JAMS minimum standards of fairness also mean that the cost and
19 burden to Lensa users seeking to enforce their privacy rights in arbitration would be
20 overwhelmingly burdensome, specifically by being forced to arbitrate hundreds or
21 thousands of miles from their homes and also by being subject to potentially ruinous
22 arbitrator's fees should they invoke dispute resolution. Moreover, Defendant's
23 arbitration clause contains no provision for discovery save for the incorporation of the
24 JAMS rules, which provide only for "voluntary and informal" exchange of information,
25 with no provision for taking depositions, propounding interrogatories or request to
26 admit, or exchanging expert reports. In a highly technical case involving biometrics,
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1 artificial intelligence, and privacy rights, a plaintiff could not hope to obtain the proof
 2 needed to establish a claim for violation of the Illinois Biometric Information Privacy
 3 Act through such a limited process.

4 For each of these reasons, and those set forth more fully below, Plaintiffs
 5 respectfully submit that Defendant's motion be denied.

6 ARGUMENT AND AUTHORITIES

7 A. Legal Standard

8 It is well-settled that "a party cannot be required to submit to arbitration any
 9 dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Commations*
 10 *Workers of Am.*, 475 U.S. 643, 648 (1986) (internal quotation marks omitted). "In
 11 determining whether a valid arbitration agreement exists, federal courts 'apply ordinary
 12 state-law principles that govern the formation of contracts.'" *McFaddin v. E.A. Renfroe*
 13 & Co., Inc., No. ED-CV-1402369-VAP-SPX, 2015 WL 13774236, at *4 (C.D. Cal.
 14 Feb. 10, 2015) (*quoting Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir.
 15 2014) and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). The
 16 Court applies the law of the forum state -- here, California -- when making choice of
 17 law determinations. *Id.*; *see also See ABF Capital Corp. v. Grove Props. Co.*, 126 Cal.
 18 App. 4th 204, 215 (2005) (*quoting Wash. Mut. Bank v. Superior Court*, 24 Cal. 4th 906,
 19 919-20 (2001)).

20 B. By its own Terms, Defendants' Arbitration Provision Shows There was 21 no Meeting of the Minds to Arbitrate

22 "To form a contract, a manifestation of mutual assent is necessary." *Binder v.*
 23 *Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 850 (1999). Here, the only agreement
 24 established by Defendant was that "all disputes arising out of or relating to these Terms
 25 or Prisma will be resolved through confidential binding arbitration held in Santa Clara
 26 County, California in accordance with the Streamlined Arbitration Rules and
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1 Procedures (“**Rules**”) of the Judicial Arbitration and Mediation Services (“**JAMS**”),
 2 which are available on the JAMS website and hereby incorporated by reference.” (See
 3 Dkt. 21 at 5 (emphasis in original)). There is no other provision in Defendant’s Terms
 4 of Use that specify an alternative forum that will hear a consumer dispute pursuant to
 5 the requirements that Defendant itself specified (likely there are none).

6 And the JAMS rules in effect as of the date that Defendant claims the contract
 7 was formed, state that JAMS will not administer an arbitration based on the arbitration
 8 provision Defendant specified. In particular, the JAMS “Consumer Arbitration
 9 Minimum Standards” (the “Consumer Fairness Standards”) provides, “JAMS will
 10 administer arbitrations pursuant to mandatory pre-dispute arbitration clauses between
 11 companies and consumers *only if* the contract arbitration clause and specified applicable
 12 rules comply with the following minimum standards of fairness.”¹ (emphasis added.)
 13 Pertinent here, the Consumer Fairness Standards specify the following minima:

14 5. The consumer must have a right to an in-person hearing in his or her
 15 hometown area.

16 ***

17 7. With respect to the cost of the arbitration, when a consumer initiates
 18 arbitration against the company, the only fee required to be paid by the
 19 consumer is \$250, which is approximately equivalent to current Court
 filing fees. All other costs must be borne by the company, including any
 remaining JAMS Case Management Fee **and all professional fees for the
 arbitrator’s services.**²

20 Defendant’s arbitration provision does not meet these “minimum” Consumer Fairness
 21 Standards.

22 First, Defendant’s arbitration provision mandates one location and one location
 23 only: Defendant’s hometown of Santa Clara County, California. By contrast, Plaintiffs
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25 ¹ JAMS Consumer Arbitration Minimum Standards, available at
 26 <https://www.jamsadr.com/consumer-minimum-standards/>. Notably, the JAMS consumer arbitration
 standards are not new; the current version has been in effect since July 15, 2009.

27 ² *Id.*

1 (and each person in the putative class) are Illinois residents, meaning they must travel
 2 across country to enforce their rights. JAMS's published rules state that it will not hear
 3 a dispute where the arbitration agreement imposes such a requirement. The parties
 4 cannot have agreed to an arbitration before JAMS that JAMS will not hear. There is no
 5 meeting of the minds and so arbitration must be denied.

6 And that is not the only reason that the arbitration clause fails. Defendant's
 7 provision also imposes a massive cost that discourages consumers from invoking their
 8 rights; specifically, shared liability to pay potentially tens of thousands of dollars in
 9 arbitrator fees. JAMS will not hear an arbitration that imposes this requirement either,
 10 so there is no meeting of the minds for this independent reason as well.

11 As noted above, the arbitration provision expressly requires the consumer to
 12 submit to the JAMS SARP. Those rules provide in plain terms that the parties are jointly
 13 and severally liable for arbitrator compensation and expenses:

14 The Parties are jointly and severally liable for the payment of JAMS
 15 Arbitration fees and Arbitrator compensation and expenses. In the event
 16 that one Party has paid more than its share of such fees, compensation and
 17 expenses, the Arbitrator may Award against any Party any such fees,
 18 compensation and expenses that such Party owes with respect to the
 19 Arbitration.

20 Rule 26(c), JAMS SARP (emphasis added), available at
 21 <https://www.jamsadr.com/rules-streamlined-arbitration/>.³ By incorporating the
 22 JAMS streamlined rules, Defendant puts the consumer in jeopardy of joint and
 23 several liability for the arbitrator's compensation and expenses.

24 ³ Despite incorporating the fee provisions of the SARP, Defendant separately states that it will pay the
 25 JAMS fees and costs. (Dkt. 21-2, Lensa Terms of Use, at 15) ("You and the Company agree that for
 26 any arbitration you initiate, you will pay the filing fee and the Company will pay the remaining JAMS
 27 fees and costs."). However, JAMS's fees and costs are separate from the Arbitrator compensation and
 28 expenses (and which are generally far greater than the JAMS fees and costs). See SARP Rule 26(c)
 ("The Parties are jointly and severally liable for the payment of **JAMS Arbitration fees and
 Arbitrator compensation and expenses.**"). Thus, Defendant's provision still leaves the consumer
 at risk of compensation and expenses that make the case not arbitrable by JAMS (and which unfairly
 discourages consumers from enforcing their claims).

1 While there may be some other arbitration outfit that is willing to hear
 2 arbitrations under terms that are onerous to consumers, the Court cannot compel
 3 arbitration before such a forum without rewriting the contract, something a court may
 4 not do. *See Macias v. Excel Bldg. Svcs., LLC*, 767 F. Supp. 2d 1002, 1012 (N.D. Cal.
 5 2013) (courts are not permitted to rewrite arbitration agreements); *Little v. Auto*
 6 *Stiegler, Inc.*, 29 Cal. 4th 1064, 1075, 130 Cal.Rptr.2d 892 (2003) (same). Likewise, the
 7 Court cannot rewrite Defendant's arbitration provision to strike the offensive
 8 provisions, nor to impose the minimum consumer fairness requirements that Defendant
 9 left out. *Id.*

10 **C. The Arbitration Provision is Unenforceable Because it is Unconscionable**

11 Defendant's motion should be denied on the separate and independent grounds
 12 of unconscionability. "An agreement to submit disputes to arbitration 'is valid,
 13 enforceable and irrevocable, save upon such grounds as exist for the revocation of any
 14 contract.'" *OTO, L.L.C. v. Kho*, 8 Cal.5th 111, 125, 251 Cal.Rptr.3d 714, 447 P.3d 680
 15 (2019); *accord, Alvarez v. Altamed Health Services Corp.*, 60 Cal.App.5th 572, 580,
 16 274 Cal.Rptr.3d 802 (2021). "[G]enerally applicable contract defenses, such as ...
 17 unconscionability, may be applied to invalidate arbitration agreements without
 18 contravening the FAA or California law." *OTO*, 8 Cal.5th at 125; *accord, Pinnacle*
 19 *Museum Tower Assn. v. Pinnacle Market Development (US), LLC* 55 Cal.4th 223, 246,
 20 145 Cal.Rptr.3d 514, 282 P.3d 1217 (2012).

21 "A contract is unconscionable if one of the parties lacked a meaningful choice in
 22 deciding whether to agree and the contract contains terms that are unreasonably
 23 favorable to the other party. Under this standard, the unconscionability doctrine 'has
 24 both a procedural and a substantive element. The procedural element addresses the
 25 circumstances of contract negotiation and formation, focusing on oppression or surprise
 26 due to unequal bargaining power. Substantive unconscionability pertains to the fairness

1 of an agreement's actual terms and to assessments of whether they are overly harsh or
 2 one-sided.”” *OTO*, 8 Cal.5th at 125 (internal quotations omitted). While both
 3 “procedural and substantive unconscionability must be shown for the defense to be
 4 established, ‘they need not be present in the same degree.’ Instead, they are evaluated
 5 on ‘a sliding scale.’ ‘[T]he more substantively oppressive the contract term, the less
 6 evidence of procedural unconscionability is required to’ conclude that the term is
 7 unenforceable.” *Id.*at 125-126 (internal quotations and citations omitted).

8 Here, there can be no argument but that the arbitration provision is a contract of
 9 adhesion and that Plaintiffs and the putative class members had no ability to negotiate
 10 its terms; as Defendant acknowledges in its motion, “it is impossible to even open the
 11 App without receiving and agreeing to the TOU.” (Dkt. 21 at 3.) Moreover, Defendant’s
 12 express reference to JAMS streamlined rules dictates that a user will be saddled with
 13 half of the arbitrator’s compensation and expenses, a sum which can quickly dwarf the
 14 available damages under Illinois’s BIPA law, even if the separate JAMS fees are
 15 excluded. See SARP Rule 26(c). The only way for a user to challenge this unfair and
 16 improper imposition would be to file the arbitration and subject themselves to the risk
 17 of the ruinous Arbitrator’s compensation and expenses. California has long recognized
 18 that requiring consumers to subject themselves to the oppressive terms in order to
 19 challenge the oppressive terms is procedurally unconscionable. *See, e.g., Murrey v.*
20 Superior Court, 87 Cal. App. 5th 1223, 1245-46 (2023) (citing *Harper v. Ultimo*, 113
 21 Cal. App. 4th 1402, 1406, 7 Cal. Rptr. 3d 418 (2003))

22 Likewise, Defendant’s use of an arbitration provision that fails to adhere to the
 23 JAMS *minimum Consumer Fairness Standards*, establishes substantive
 24 unconscionability. It is well-settled that an arbitration provision which imposes a
 25 significant burden or costs on a consumer is substantively unconscionable. Here,
 26 Defendant imposed several offensive provisions, any one of which makes the
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1 arbitration clause unconscionable and unenforceable.

2 First, it is unreasonable to force consumers to arbitrate thousands of miles from
3 home. “State and federal courts in California have found arbitration clauses that require
4 parties to travel across the country to arbitrate their claims unconscionable.” *McFaddin*,
5 2015 WL 13774236 at * 4 (C.D. Cal. Feb. 10, 2015). An arbitration clause may be
6 unconscionable “if the place or manner in which arbitration is to occur is unreasonable
7 taking into account the respective circumstances of the parties.” *Bolter v. Superior*
8 *Court*, 87 Cal. App. 4th 900, 908, 104 Cal.Rptr.2d 888 (2001). *See also Nagrampa v.*
9 *MailCoups, Inc.*, 469 F.3d 1257, 1289 (9th Cir. 2006) (finding arbitration clause that
10 “would require a one-woman franchisee who operates from her home to fly across the
11 country [to Boston] to arbitrate a contract signed and performed in California”
12 unconscionable); *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002)
13 (“Limiting venue to PayPal’s backyard appears to be yet one more means by which the
14 arbitration clause serves to shield Pay-Pal from liability instead of providing a neutral
15 forum in which to arbitrate disputes.”); *Bolter*, 87 Cal. App. 4th at 908 (finding forum
16 selection provision in arbitration clause requiring arbitration in Utah unconscionable
17 and noting that “[b]ecause Dry-Chem franchises are by nature small businesses, it is
18 simply not a reasonable or affordable option for franchisees to abandon their offices [in
19 California] for any length of time to litigate a dispute several thousand miles away”).

20 Second, Defendant required that Plaintiffs share joint and several liability for the
21 arbitrator’s compensation and expenses. In other words, any plaintiff who brings an
22 arbitration against Prisma risks paying *all* of the arbitrator’s costs and expenses.
23 Defendant’s gambit is that consumers will be dissuaded from enforcing their claims.
24 The provision renders any arbitration agreement unenforceable. *See, e.g., Areendariz*
25 *v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 102, 99 Cal.Rptr.2d 745,
26 6 P.3d 669 (2000) (arbitration agreement is lawful only if it does not require plaintiffs

1 “to pay either unreasonable costs or any arbitrator fees or expenses”); *see also Mills v.*
 2 *Facility Sols. Grp., Inc.*, 84 Cal. App. 5th 1035, 1049–68, 300 Cal. Rptr. 3d 833, 843–
 3 60 (2022) (finding requirement that plaintiff pay for appeal and various arbitrator fees
 4 substantively unconscionable).

5 Finally, and equally problematic, is the limitation on discovery imposed by
 6 Defendant’s arbitration provision. By mandating the JAMS streamlined rules, the
 7 arbitration provision cabins discovery to what Defendant voluntarily chooses to
 8 provide. SARP Rule 13(a) (providing for only the “voluntary and informal exchange of
 9 all non-privileged documents and information (including electronically stored
 10 information (‘ESI’) relevant to the dispute or claim.”)⁴ There is no ability to compel
 11 evidence that Defendant does not wish to reveal: no interrogatories, no requests to
 12 admit, no expert disclosures, no depositions. The recent *Mills* case is instructive on this
 13 point. In that case the arbitration provision actually permitted more discovery than
 14 Defendant’s arbitration provision allows in that it expressly permitted depositions,
 15 expert designations, and the ability to issue subpoenas. Additional discovery, however,
 16 was at the discretion of the arbitrator. Citing *Armendariz* and *Davis v. Kozak*, 53 Cal.
 17 App. 5th 897 (2020), the court held that such limited discovery effectively “frustrated
 18 the [plaintiff’s] statutory rights.” 84 Cal. App. 5th at 1059-60. So too, here.

19 Accordingly, Defendant’s unilaterally drafted and imposed arbitration agreement
 20 is thrice unconscionable. It cannot be enforced consistent with California law and thus
 21 federal standards.

22 CONCLUSION

23 For each of the foregoing reasons, Plaintiffs, on behalf of themselves and the
 24 putative class, respectfully request that the Court deny Defendant’s motion and award
 25 Plaintiffs such other and further relief as the Court deems just and proper.

26 ⁴ Rule 13(a), JAMS Streamlined Arbitration Rules & Procedures, available at
 27 <https://www.jamsadr.com/rules-streamlined-arbitration/>.

1 Dated: July 5, 2023

2 Respectfully submitted,

3 /s/ Thomas M. Hanson

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